No. 79-244

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN M. SALVUCCI, JR., AND JOSEPH G. ZACKULAR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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CITATIONS

Cases:

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-10a) is not yet reported. The district court entered no opinion pertaining to the question presented in this petition.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 11a) was entered on June 15, 1979. On July

9, 1979, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including August 14, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant whose constitutional rights were not violated by an illegal search may nevertheless obtain suppression of an item seized during the search solely because the indictment charges him, as an essential element of the offense, with unlawful possession of that item at the time of the search.

STATEMENT

1. On May 5, 1978, respondents were charged in a federal indictment with 12 counts of unlawful possession of stolen mail, in violation of 18 U.S.C. 1708. The indictment was based on 12 checks that had been stolen from the United States mails and that were seized by Massachusetts State Police officers on December 17, 1976, during their search, pursuant to a state warrant, of an apartment rented by the mother of respondent Zackular (App. A, *infra*, 1a-2a).[1] The indictment charged respondents with possession of

[1] The affidavit submitted in support of the application for a search warrant erroneously identified the premises as the apartment of Zackular's wife (App. A, *infra*, 4a n.1), and this error was repeated in the court of appeals' opinion (*id.* at 2a). It was established at a pretrial hearing, however, that the apartment was rented by Zackular's mother (C.A. App. 61, Tr. 45).

the stolen mail from November 7, 1975, through December 17, 1976, the date on which the search occurred (App. A, *infra*, 10a).

2. Respondents moved to suppress the checks and other evidence found during the search on the ground that the state officer's affidavit supporting the application for the search warrant was inadequate to show probable cause (C.A. App. 11-14). The district court granted those motions and ordered suppression.[2] The government sought reconsideration of the district court's ruling, contending that respondents lacked standing to challenge the legality of the search and seizure (C.A. App. 126). By handwritten fiat on the face of the government's motion, the district court reaffirmed its suppression order (C.A. App. 126a; App. A, *infra*, 2a).

3. On the government's appeal pursuant to 18 U.S.C. 3731, the court of appeals affirmed (App. A, *infra*, 1a-10a). With respect to the issue of "standing,"[3] the court stated (*id.* at 8a-9a):

> We agree with the Government that neither [respondent] has actual standing to contest the law-

[2] The district court held the officer's affidavit to be deficient in relying on double hearsay and in failing to specify both the date on which the informant had engaged in a critical conversation with respondent Zackular and the date on which the informant had conveyed the information so obtained to the officer (C.A. App. 121-125).

[3] The court of appeals also affirmed the district court's determination that the affidavit in support of the search warrant was constitutionally inadequate (App. A, *infra*, 2a-8a). We do not present that issue for review.

> fulness of the search and seizures. Neither [respondent] has established a reasonable expectation of privacy in the premises searched or the property seized, nor has either of them ever claimed a proprietary or possessory interest in the premises or the checks. [*Brown* v. *United States*, 411 U.S. 223, 229 (1973)].

Nevertheless, the court held that respondents had standing to challenge the search and seizure under the "automatic standing" rule of *Jones* v. *United States*, 362 U.S. 257 (1960). It noted that the Court in *Jones* had based the "automatic standing" rule on two considerations (App. A, *infra*, 9a):

> (1) the unfairness of requiring the defendant to assert a proprietary or possessory interest in the premises searched or the items seized when his statements could later be used at trial to prove a crime of possession; and (2) the vice of prosecutorial self-contradiction, that is, allowing the Government to allege possession as part of the crime charged, and yet deny that there was possession sufficient for standing purposes. [*Jones* v. *United States*] at 261-65; *Brown* v. *United States*, *supra* at 229.

After acknowledging that the first consideration had been eliminated by the decision in *Simmons* v. *United States*, 390 U.S. 377, 389-394 (1968), that a defendant's testimony in support of a suppression motion cannot be used against him at trial (App. A, *infra*, 9a), the court of appeals continued (*id.* at 9a-10a):

> The Supreme Court itself has questioned, but unfortunately not decided, whether the second prong of the *Jones* rationale, prosecutorial self-contradiction, alone justifies the continued vitality of the doctrine of automatic standing. *See Rakas* v. *Illinois*, *supra* at 4027 n.4; *Brown* v. *United States*, *supra* at 228, 229. Since the Supreme Court first questioned the vitality of this doctrine in *Brown*, there has been a split of authority as to whether the doctrine survives. *Compare United States* v. *Riquelmy*, 572 F.2d 947, 950-51 (2d Cir. 1978), and *United States* v. *Boston*, 510 F.2d 35, 37-38 (9th Cir. 1974), *cert. denied*, 421 U.S. 990 (1975) (doctrine survives) *with United States* v. *Delguyd*, 542 F.2d 346, 350 (6th Cir. 1976) (doctrine does not survive). Until the Supreme Court rules on this question, we are not prepared to hold that the automatic standing rule of *Jones* has been implicitly overruled by *Simmons*. That is an issue which the Supreme Court must resolve.

Finding that the indictment in this case charged as an essential element of the offense that respondents were in unlawful possession of the stolen mail on the date of the contested search and seizure, the court held that respondents had "automatic standing" under *Jones* and affirmed the district court's suppression order (*id.* at 10a).

REASONS FOR GRANTING THE PETITION

In *Jones* v. *United States*, 362 U.S. 257 (1960), the Court held that a defendant automatically has standing under the Fourth Amendment to move to

exclude from evidence an item that was seized during an assertedly illegal search where possession of the item by the defendant at the time of the search constitutes an essential element of the offense charged.[4]

However, this Court has recently noted that it has "not yet had occasion to decide whether the automatic standing rule of *Jones* survives [the] decision in *Simmons* v. *United States*, 390 U.S. 377 (1968)." *Rakas* v. *Illinois*, No. 77-5781 (Dec. 5, 1978), slip op. 7 n.4.[5] The lack of guidance from the Court has resulted in a division of authority in the courts of appeals on the continued vitality of the *Jones* "automatic standing" rule. The instant case provides an appropriate opportunity for the Court to resolve this important and recurring issue.

1. As the Court has repeatedly emphasized, the Fourth Amendment protects individuals from unreasonable invasions of their legitimate expectations of privacy. *Rakas* v. *Illinois*, *supra*, slip op. 15; *United States* v. *Chadwick*, 433 U.S. 1, 11 (1977). See also, *e.g.*, *United States* v. *Miller*, 425 U.S. 435, 440 (1976); *Alderman* v. *United States*, 394 U.S. 165, 179 n.11 (1969); *Katz* v. *United States*, 389 U.S. 347 (1967); *Warden* v. *Hayden*, 387 U.S. 294, 304 (1967). "Fourth Amendment rights are personal

[4] The defendant in *Jones* was also held to have standing because of his legitimate expectation of privacy in the premises that were searched. See *Rakas* v. *Illinois*, No. 77-5781 (Dec. 5, 1978), slip op. 15.

[5] The Court found it unnecessary to reach the question in *Brown* v. *United States*, 411 U.S. 223, 228-229 (1973). See also *Combs* v. *United States*, 408 U.S. 224 (1972).

rights which, like some other constitutional rights, may not be vicariously asserted." *Rakas* v. *Illinois*, *supra*, slip op. 5, quoting *Alderman* v. *United States*, *supra*, 394 U.S. at 174.[6] Accordingly, "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. *Alderman*, *supra*, at 174." *Rakas* v. *Illinois*, *supra*, slip op. 5. The "automatic standing rule is inconsistent with these principles, for it "may allow a defendant to assert the Fourth Amendment rights of another." *Id.* at 7 n.4.

The doctrine of "automatic standing" was originally devised to serve the interrelated aims of (1) relieving a defendant from the dilemma in which, in order to assert his Fourth Amendment suppression claim, he would have to give testimony that the government could directly use against him at trial to prove his guilt, and (2) avoiding the "vice of prosecutorial self-contradiction" in the government's denying that the defendant had a possessory interest for

[6] The Court in *Rakas* abandoned the concept of "standing" under the Fourth Amendment, stating that "the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing" (slip op. 10-11). In this analysis the relevant inquiry is "whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect" (*id.* at 12).

purposes of the Fourth Amendment suppression claim while at the same time alleging defendant's possession as part of the offense charged. *Jones* v. *United States*, *supra*, 362 U.S. at 261, 263-264; *Brown* v. *United States*, *supra*, 411 U.S. at 229.[7] The first consideration was eliminated by this Court's subsequent holding in *Simmons* v. *United States*, *supra*, that a defendant's testimony on a motion to suppress cannot be used against him as part of the government's case at trial. As the Court recognized in *Brown* v. *United States*, *supra* (411 U.S. at 228), "The self-incrimination dilemma, so central to the *Jones* decision, can no longer occur under the prevailing interpretation of the Constitution [in *Simmons*]."

The second basis for the *Jones* rule, the "vice of prosecutorial self-contradiction," does not justify including within the sweep of the exclusionary rule a defendant whose Fourth Amendment rights were not violated by the challenged search. The Court in *Jones* was concerned (362 U.S. at 263-264) that "[i]t is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government." See also *Brown* v. *United States*, *supra*, 411 U.S. at 229. But there is nothing either inconsistent or untoward in recognizing that the con-

[7] Thus, "automatic standing" was directed not to the privacy interests embodied in the Fourth Amendment but rather to a problem of self-incrimination and the perceived impropriety of the government's position in criminal cases.

cept of "possession" can have different meanings in different contexts. In particular, it does not disserve our system of laws to require that a defendant who seeks to invoke the Fourth Amendment and the exclusionary rule must demonstrate a personal interest reflecting a legitimate expectation of privacy, while at the same time prosecuting for violations of the criminal code those who had constructive but not actual possession of the items seized at the time of the search.[8] Moreover, whatever its logical force, this rationale by itself should not suffice to impose upon society the heavy costs of allowing defendants to obtain suppression of probative evidence even though their Fourth Amendment rights were not infringed.

2. There is clear disagreement among the circuits on the continued applicability of the "automatic standing" rule. The Sixth Circuit has abandoned the rule in light of *Simmons* v. *United States*. See *United States* v. *Grunsfeld*, 558 F.2d 1231, 1241-1242 (6th Cir. 1977), cert. denied, 434 U.S. 872, 1016 (1978); *United States* v. *Delguyd*, 542 F.2d 346, 350 (6th Cir. (1976); *United States* v. *Dye*, 508 F.2d 1226, 1232-1234 (6th Cir. 1974), cert. denied, 420 U.S. 974 (1975). The Tenth Circuit has suggested that it reads *Simmons* and *Brown* to repudiate the "automatic standing" rule. See *United States* v. *Smith*, 495 F.2d 668, 670 (10th Cir. 1974). The Fifth Cir-

[8] The "automatic standing" rule also suffers from treating a possessory interest in the items *seized* as sufficient to permit a Fourth Amendment challenge to the underlying *search*. See, *e.g.*, *United States* v. *Lisk*, 522 F.2d 228 (7th Cir. 1975) (Stevens, J.), cert. denied, 423 U.S. 1078 (1976).

cuit has expressed "serious doubts concerning the viability of the 'automatic standing' rule in light of *Simmons* v. *United States*" (*United States* v. *Edwards*, 577 F.2d 883, 892 (5th Cir. 1978) (en banc)),[9] but nonetheless has continued to apply the rule. See, *e.g.*, *United States* v. *Ullrich*, 580 F.2d 765, 768 (5th Cir. 1978). The Second Circuit, while expressing "misgivings about the continued survival of the concept of automatic standing" (*United States* v. *Oates*, 560 F.2d 45, 52 (2d Cir. 1977)), has stated "that overruling *Jones* is properly a matter for the Supreme Court." *United States* v. *Galante*, 547 F.2d 733, 737 (2d Cir. 1976); see also *United States* v. *Ochs*, 595 F.2d 1247, 1253 n.4 (2d Cir. 1979); *United States* v. *Riquelmy*, 572 F.2d 947, 950-951 (2d Cir. 1978); *United States* v. *Oates*, *supra*. The Eighth Circuit has also declared that it will adhere to the "automatic standing" rule in the absence of a clear mandate from this Court (see *United States* v. *Anderson*, 552 F.2d 1296, 1299 (8th Cir. 1977)), while the Seventh and Ninth Circuits have indicated that they still recognize the doctrine of "automatic standing." See *United States* v. *Alewelt*, 532 F.2d 1165, 1167 (7th Cir. 1976); *United States* v. *Powell*, 587 F.2d 443, 446 (9th Cir. 1978). And in the instant case the First Circuit held (App. A, *infra*, 9a) that despite *Simmons*, *Brown* and *Rakas*, it would abide by the rule until the Court passes on the issue.

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[9] Five judges in *Edwards* concluded that the "automatic standing" rule should be eliminated (577 F.2d at 896). See also *United States* v. *Cotham*, 363 F. Supp. 851 (W.D. Tex. 1973).

Such a division of authority on a recurring and important question clearly calls for review by this Court.

3. The instant case offers the Court the occasion to resolve the "automatic standing" issue. The indictment charges respondents with unlawful possession of stolen mail on the date of the search as an essential element of the offense alleged. Moreover, the court of appeals explicitly and correctly held (App. A, *infra*, 8a-9a) that respondents, who had no proprietary or possessory interest in the apartment that was searched and were not present at the time of the search, have no "actual standing." Thus, the "automatic standing" rule is applicable under *Jones* and provides the only basis for respondents to contest the legality of the search and seizure.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1979

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 78-1529

UNITED STATES OF AMERICA, APPELLANT

v.

JOHN M. SALVUCCI, JR., JOSEPH G. ZACKULAR,
DEFENDANTS, APPELLEES

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[HON. W. ARTHUR GARRITY, *U.S. District Judge*]

Before ALDRICH AND CAMPBELL, *Circuit Judges*,
and GIGNOUX, *District Judge**

June 15, 1979

GIGNOUX, *District Judge*. On May 15, 1978, defendants-appellees, John M. Salvucci, Jr. and Joseph

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* Of the District of Maine, sitting by designation.

G. Zackular, were indicted by a federal grand jury and charged in 12 counts with unlawful possession of checks stolen from the mail, a violation of 18 U.S.C. § 1708. The checks involved had been seized from an apartment rented by Zackular's wife at 93 Pleasant Street, Melrose, Massachusetts. The seizure was made by officers of the Massachusetts State Police acting pursuant to a search warrant issued by the Malden District Court.

Defendants filed a motion to suppress the seized checks as evidence against them at trial. This motion was granted by the district court, after hearing, on the ground that the affidavit supporting the search warrant failed to establish the requisite probable cause for the issuance of the warrant. Thereafter, the United States filed a motion for reconsideration, arguing that defendants lacked standing to contest the search and seizures. After considering memoranda submitted by counsel, the district court reaffirmed its suppression order.

The Government's appeal from these adverse rulings presents two issues: (1) whether the affidavit supporting the search warrant established probable cause for issuance of the warrant; and (2) whether defendants have standing to contest the search and seizures. As we conclude that the district court properly suppressed the checks, we affirm its order.

I

We address first the question of whether the supporting affidavit established probable cause for the

issuance of the warrant. The warrant, authorizing the search of the premises located at 93 Pleasant Street, Apartment 93E, Melrose, Massachusetts, was issued by a clerk of the Malden District Court solely upon the basis of the affidavit of Massachusetts State Police Trooper Ronald J. Bellanti. The objects authorized to be seized were a checkwriting machine, other articles used to make forged checks, and forged checks. Bellanti's affidavit, the relevant portions of which are fully set out in the margin,[1] recited the

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[1] The affidavit presented to the state court clerk reads, in relevant part, as follows:

AFFIDAVIT IN SUPPORT OF APPLICATION FOR SEARCH WARRANT

As a result of information received from a reliable [*sic*] informant, who has provided me with reliable information in the past, to wit:

On October 24, 1976 this informant told this officer that on October 22, 1976 four round trip open-end coach tickets were purchased at the TWA ticket counter at Logan Airport in East Boston for passage from Boston to Las Vega, Nevada, and Las Vegas to Boston, with a forged bank check which carried the name of Marblehead Savings Bank for the sum of $1,552.00, and that this purchase was made by a Kathleen Burke, who was arrested for a like offense on October 23, 1976 by this officer. . . . As a result of the information furnished to this officer by the informant, and an investigation that was conducted, subject Kathleen Burke, on November 9, 1976 was served with a warrant at the East Boston District Court and charged with two complaints . . . . This informant also gave this officer information regarding a Joseph G. Zackular of 247 Washington St., Winthrop, Mass. This information was in reference to a conversation, in which subject Zackular had made statements

following material facts. On October 24, 1976, Bellanti had received information from a reliable informant that on October 22, 1976, one Kathleen Burke had purchased four airline tickets with a forged bank check. The same informant also gave

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regarding his possession of certain articles that he had in his apartement at 247 Washington St., Winthrop which were used to manufacture counterfeit licenses, and to manufacture forged checks. And that these articles were the ones used to make the license that subject Burke had used for identification when she passed the above mentioned forged checks. This information furnished by the informant and an investigation conducted by this officer led to a successful raid on subject Zackular's house in Winthrop and his arrest. . . . This informant who has proven its reliability in the past by giving to this officer the aforementioned reliable information has given this officer the following information. That prior to this date it was present during a conversation in which Joseph G. Zackular had stated he had a check writer which was being kept at his wife's apartment in Melrose. And that subject Zackular had stated this check writer is the one that had been being used to print amounts of money payable on forged checks. The informant also told this officer that the person that subject Zackular had referred as his wife, to best of the informants [*sic*] knowledge is either his present or past wife. The informant also stated that this subjects [*sic*] name was Jean D. Zackular and that he knew the location of her apartment. On December 14, 1976 this officer with the informant went to the Town Estates in Melrose, and the informant pointed out several windows belonging to the apartment occupied by Jean D. Zackular. . . . On December 15, 1976 this officer went to the Town Estates Apartment Complex and after investigation, it was learned that subject Jean D. Zackular occupies apartment #93E located on third floor of 93 Pleasant St., and that this apartment was leased to subject Jean D. Zackular on May 15, 1975, and that the lease is self-extending.

Bellanti information regarding defendant Zackular. This information concerned a conversation in which Zackular made statements regarding his possession of certain articles located in his apartment at 247 Washington Street, Winthrop, Massachusetts, which were used to manufacture counterfeit licenses and forged checks, including the counterfeit license used by Kathleen Burke for identification when she purchased the above-mentioned airline tickets. This information led to a successful raid of Zackular's apartment and his arrest.

Bellanti's affidavit further set forth that the informant "who has proven its reliability in the past by giving to this officer the aforementioned reliable information" has furnished the following information: "That prior to this date it [the informant] was present during a conversation in which Joseph G. Zackular had stated he had a check writer which was being kept at his wife's apartment in Melrose," and that this checkwriter was the one that had been used to print amounts of money payable on forged checks. The informant also told Bellanti that the person Zackular had referred to as his wife was either his present or past wife, and her name was Jean D. Zackular. Finally, the affidavit recites that on December 14, 1976, Bellanti, with the informant, went to the Town Estates in Melrose, where the informant pointed out several windows belonging to the apartment occupied by Jean D. Zackular. On December 15, 1976, Bellanti returned to the apartment complex and learned that Apartment 93E was leased by Jean D. Zackular.

The warrant was issued on December 15, 1976, and the search was conducted on December 17. During the search, a checkwriting machine and a large number of stolen checks were seized.

We agree with the court below that Bellanti's affidavit was insufficient to establish probable cause to issue a search warrant. At the outset, we are aware that we must interpret the affidavit "in a commonsense and realistic fashion," not with "[a] grudging or negative attitude" or in a "hypertechnical" manner. *United States* v. *Ventresca*, 380 U.S. 102, 108-09 (1965). Nevertheless, the Fourth Amendment requires that the supporting affidavit set forth facts sufficient to allow a neutral magistrate to reasonably conclude that the property sought is located on the premises to be searched at the time the warrant issues. *Rosencranz* v. *United States*, 356 F.2d 310, 314-18 (1st Cir. 1966). A reviewing court may consider only that information which is contained within the four corners of the supporting affidavit. *Aguilar* v. *Texas*, 378 U.S. 108-109 n.1 (1964); *Rosencranz* v. *United States*, *supra* at 314. The fatal defect in the present affidavit is that it does not disclose the date of the conversation overheard by the informant in which Zackular stated that the checkwriter used to print forged checks was being kept at his wife's apartment in Melrose. Without this date, there was no way for the magistrate to determine whether the information was sufficiently timely to support the warrant. The absence of any reasonably specific averment as to the time of this conversation is fatal

to the warrant. *Rosencranz* v. *United States*, *supra* at 315-18.

We recognize that where "undated information is factually interrelated with other, dated information in the affidavit, then the inference that the events took place in close proximity to the dates actually given may be permissible." *United States* v. *Holliday*, 474 F.2d 320, 322 (10th Cir. 1973). Relying on this rule, the Government contends that a reading of the entire affidavit permits an inference that both Bellanti's undated conversation with the informant and the conversation with Zackular overheard by the informant took place between October 24 and December 15, 1976.[2] While we might agree that one can reasonably infer from the present affidavit that Bellanti's conversation with the informant took place after October 24, 1976, there is nothing in the affidavit that suggests when the informant obtained the relevant information from Zackular. The affidavit simply states that "*prior to this date* [the date of the warrant application] it [the informant] was

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[2] As we reject the invited inference as to its date, we need not reach the question whether the information received by the informant in the conversation with Zackular would be sufficiently timely, under the Government's theory, to support a finding of probable cause at the time the warrant issued. *See Andresen* v. *Maryland*, 427 U.S. 463, 478-79 n.9 (1976); *United States* v. *Brinklow*, 560 F.2d 1003, 1005-06 (10th Cir. 1977); *cert. denied*, 434 U.S. 1047 (1978); *United States* v. *DiMuro*, 540 F.2d 503, 515-16 (1st Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *United States* v. *Steeves*, 525 F.2d 33, 38 (8th Cir. 1975); *Rosencranz* v. *United States*, *supra* at 316 n.3 and cases there cited.

present during a conversation in which Joseph G. Zackular had stated that he had a checkwriter which was being kept at his wife's apartment in Melrose." (emphasis added). It is impossible to know from the affidavit if the conversation occurred days, months, or years prior to the application for the warrant. As stated by this Court in *Rosencranz* v. *United States*, *supra* at 318, "undated, conclusory information from an anonymous source . . . with no other reasonably specific clues to the time" is inadequate to justify a finding of probable cause.

II

We now turn to the issue of defendants' standing to challenge the lawfulness of the search of the Melrose apartment and the seizures of the checks found therein. Although the district court did not articulate its reasons for rejecting the Government's contentions, we agree that defendants have standing.

As a general rule, Fourth Amendment rights may not be vicariously asserted. *Alderman* v. *United States*, 394 U.S. 165, 174 (1969). To contest a search and seizure on Fourth Amendment grounds, a defendant must have either "actual standing" or "automatic standing." To have actual standing, a defendant must establish a legitimate and reasonable expectation of privacy in the premises searched or the property seized. *Rakas* v. *Illinois*, 47 U.S.L.W. 4025 (U.S. Dec. 5, 1978); *see Brown* v. *United States*, 411 U.S. 223, 229 (1973). We agree with the Government that neither defendant has actual standing

to contest the lawfulness of the search and seizures. Neither defendants has established a reasonable expectation of privacy in the premises searched or the property seized, nor has either of them ever claimed a proprietary or possessory interest in the premises or the checks. *Id.*

Both defendants, however, have automatic standing to object to the search and seizures under *Jones* v. *United States*, 362 U.S. 257 (1960). In *Jones*, the Supreme Court held that a defendant has automatic standing to challenge the legality of a search or seizure if charged with a crime that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure. The Court offered a twofold rationale in support of this rule: (1) the unfairness of requiring the defendant to assert a proprietary or possessory interest in the premises searched or the items seized when his statements could later be used at trial to prove a crime of possession; and (2) the vice of prosecutorial self-contradiction, that is, allowing the Government to allege possession as part of the crime charged, and yet deny that there was possession sufficient for standing purposes. *Id.* at 261-65; *Brown* v. *United States*, *supra* at 229.

The first part of this twofold rationale was essentially eliminated by the Supreme Court's holding in *Simmons* v. *United States*, 390 U.S. 377, 389-94 (1968), that a defendant's testimony in support of a motion to suppress may not be used against him at trial. The Supreme Court itself has questioned, but

unfortunately not decided, whether the second prong of the *Jones* rationale, prosecutorial self-contradiction, alone justifies the continued vitality of the doctrine of automatic standing. *See Rakas* v. *Illinois*, *supra* at 4027 n.4; *Brown* v. *United States*, *supra* at 228, 229. Since the Supreme Court first questioned the vitality of this doctrine in *Brown*, there has been a split of authority as to whether the doctrine survives. *Compare United States* v. *Riquelmy*, 572 F.2d 947, 950-51 (2d Cir. 1978), *and United States* v. *Boston*, 510 F.2d 35, 37-38 (9th Cir. 1974), *cert. denied*, 421 U.S. 990 (1975) (doctrine survives) *with United States* v. *Delguyd*, 542 F.2d 346, 350 (6th Cir. 1976) (doctrine does not survive). Until the Supreme Court rules on this question, we are not prepared to hold that the automatic standing rule of *Jones* has been implicitly overruled by *Simmons*. That is an issue which the Supreme Court must resolve.

In the present case, the indictment charges that the defendants knowingly and unlawfully possessed checks stolen from the mails "between on or about November 7, 1975 to on or about December 17, 1976," the latter date being that on which the contested search and seizures occurred. They are charged with a crime that includes as an essential element possession of the evidence seized at the time of the contested search and seizures. They, therefore, have automatic standing to object.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1529

UNITED STATES OF AMERICA, APPELLANT

v.

JOHN M. SALVUCCI, JR., ET AL.,
DEFENDANTS, APPELLEES

JUDGMENT

Entered June 15, 1979

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/ Dana M. Gallup
Clerk.

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